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Lim Sil Hao v Selvarajah a/l Perumal

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HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO BA-12B-169-12
OF 2019
LOKE YEE CHING JC
1 JUNE 2021

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Tort — Damages — Assessment — Damages for negligence — Appeal and cross-appeal against award made — Whether awards made were manifestly excessive or inadequate

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This was an appeal and cross-appeal by the respondent ('defendant') and the appellant ('plaintiff') against the decision of the sessions court in a running down action. On 21 December 2016, at about 6.30pm, the plaintiff was riding his motorcycle along Jalan Klang-Banting-Port Dickson when he was collided into by the defendant who was driving his motor car. The collision occurred at the rear portion of the plaintiff's vehicle. The plaintiff suffered injuries as a result thereof. He was brought to the Banting Hospital and treated at the emergency department. He was diagnosed to have open fracture distal third of right tibia and fibula and was referred to the orthopaedic team for further management and admission. However, he discharged himself the next day on his own accord to seek treatment at Sri Kota Specialist Medical Centre. He was admitted on 22 December 2016 and stayed on for treatment until he was discharged 3 January 2017. The plaintiff then filed the instant suit for negligence in the sessions court. At the conclusion of the trial, the sessions court found the defendant to be wholly liable for the accident and awarded general and special damages to the plaintiff. Both parties appealed against the quantum of damages awarded. The defendant contended that some of the awards made were manifestly excessive and in excess of any discernible trend of awards made in cases involving similar injuries. The plaintiff on the other hand contended that the awards in respect of some items were inadequate. In addition, the plaintiff contended that the sessions court had erred in refusing to make any award for future loss of earnings and earning capacity.

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Held, allowing the appeal and cross-appeal partially:

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- (1) For the plaintiff's open comminuted fracture of the right tibia and fibula with a 1cm shortening, the medical evidence showed the fracture to have united. There was no reason to disturb the award of the sessions judge of RM40,000 by either reducing it or increasing it as it was neither manifestly excessive nor grossly inadequate. Based on the evidence on the extent of the scarring, RM8,000 was reasonable. For claim under muscle

- wasting, the award for the other injuries were only for the specific injuries suffered by the plaintiff. There was no issue of overlapping of damages. There was also medical evidence from both parties as to muscle wasting. The sessions court judge's award of RM5,000 was not so inadequate (see paras 15, 17 & 19–20). A
- (2) There was also no reason to disturb the award of RM5,000 for laceration wound. Next, the higher awards of more than RM10,000 in decided cases involved a more serious tendon injury. The plaintiff's claim of RM30,000 for such an injury was not justified. The sessions court award of RM10,000 was fair. The sessions court judge awarded RM5,000 for post-phlebitic syndrome without reference to any decided award. None was also referred to by both parties, although the plaintiff submitted an award of RM15,000. In the absence of any compelling reasons advanced by parties, the court was disinclined to disturb the award of the sessions court (see paras 21, 23 & 26). B C D
- (3) The plaintiff's expert's finding of the plaintiff's post traumatic sympathetic dystrophy was derived from information given by the plaintiff during his examination. The defendant's expert did not state the basis of his finding that the plaintiff did not have the symptoms. In the circumstances, the sessions court's acceptance of the findings of the plaintiff's expert was correct and there was no reason to interfere the award of RM7,000. For claim under pain and suffering for future surgery, regardless of whether the second operation was necessary, the plaintiff had undergone the first and ought to be compensated. Therefore, the award of the sessions court judge of RM5,000 was upheld (see paras 28–29 & 31). E F
- (4) There was clearly evidence of loss of earnings as it was uncertain if the plaintiff would be able to resume his employment. There was evidence of residual disability which would hamper the carrying out of his duties as before. The evidence adduced suggested there was a reasonable chance and likelihood of the plaintiff losing his employment and thereby suffering a loss of future earnings. A reduction of one-third of the salary was made for living expenses, following general practice. Based on this formula, his loss of salary was RM29,680 and so was awarded. As loss of earnings had been statutorily provided for and awarded, no award should be made for loss of earning capacity. Therefore, plaintiff's claim for a global sum of RM50,000 for loss of earning capacity was not allowed (see paras 36 & 38–39). G H
- (5) For claim under cost of future operation, as the plaintiff had undergone the operation for removal of the interlocking nail, the award of RM8,000 as proposed by the defendant was upheld. As for the amount of RM30,000 claimed by the plaintiff, there was no cogent evidence to support this amount. Travelling expenses could be expected to be I

- A incurred for the plaintiff and his family members. The plaintiff's claim for travelling expenses for his outpatient treatment was reasonable. His injuries would have necessitated a follow-up treatment. In view of the duration of his hospital stay, his family members would have also visited him. The sessions court judge's award of RM50 per trip for the travelling expenses of the plaintiff and his family members totalling RM1,500 was fair. For hospitalisation/medical fees incurred, the plaintiff must furnish evidence to show on a balance of probabilities, that the treatment needed for his injuries were not available at Banting Hospital. There was no any evidence adduced by the plaintiff in this regard. The mere fact that his insurers would bear the hospital charges alone could not justify him claiming the full cost incurred. For this reason, only one-third of the medical fees was allowed which was calculated to be RM17,390. Lastly, as the evidence for loss of actual earnings was not credibly challenged, the award was justified. However, the plaintiff further claimed for other allowances and commission not received during this period. These were payments made only if the plaintiff was in fact working. His expected commission was also speculative. Also, as an item of special damages, loss of actual earnings was to be awarded only for loss capable of substantially exact calculation (see paras 42–43, 48 & 50).
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[Bahasa Malaysia summary]

- Ini adalah rayuan dan rayuan balas oleh responden ('defendan') dan perayu ('plaintif') terhadap keputusan mahkamah sesyen dalam tindakan pelanggaran. Pada 21 Disember 2016, kira-kira jam 6.30 petang, plaintif sedang menunggu motosikalnya di sepanjang Jalan Klang-Banting-Port Dickson apabila dia dilanggar oleh defendan yang memandu keretanya. Pelanggaran berlaku di bahagian belakang kenderaan plaintif. Akibatnya, plaintif mengalami kecederaan. Dia dibawa ke Hospital Banting dan dirawat di bahagian kecemasan. Dia didiagnosis mengalami 'open fracture distal third of right tibia and fibula' dan telah dirujuk kepada pasukan ortopedik untuk pengurusan lanjut dan kemasukan. Bagaimanapun, dia keluar keesokan harinya atas kerelaan sendiri untuk mendapatkan rawatan di Pusat Perubatan Pakar Sri Kota. Dia diterima masuk pada 22 Disember 2016 dan kekal menjalani rawatan sehingga dia dikeluarkan pada 3 Januari 2017. Plaintif kemudian memfailkan saman ini untuk kecuai di mahkamah sesyen. Pada akhir perbicaraan, mahkamah sesyen mendapati defendan bertanggungjawab sepenuhnya atas kemalangan itu dan memberikan ganti rugi am dan khas kepada plaintif. Kedua-dua pihak merayu terhadap kuantum ganti rugi yang diberikan. Defendan berhujah bahawa sebahagian daripada award yang dibuat adalah keterlaluan dan melebihi mana-mana arah aliran award yang dibuat dalam kes yang melibatkan kecederaan yang serupa. Plaintif sebaliknya berpendapat bahawa award berkenaan beberapa item adalah tidak mencukupi. Di samping itu, plaintif berhujah bahawa mahkamah sesyen telah tersilap
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dalam enggan membuat sebarang award untuk kehilangan pendapatan akan datang dan kapasiti pendapatan.

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Diputuskan, membenarkan sebahagian rayuan dan rayuan balas:

- (1) Bagi 'open comminuted fracture of the right tibia and fibula with a 1cm shortening', bukti perubatan menunjukkan kepatahan itu telah bersatu. Tidak ada sebab untuk mengganggu award hakim sesyen sebanyak RM40,000 dengan sama ada mengurangkan atau meningkatkannya kerana ia tidak keterlaluan mahupun tidak mencukupi. Berdasarkan bukti mengenai tahap parut, RM8,000 adalah munasabah. Bagi tuntutan di bawah pembaziran otot, award untuk kecederaan lain hanya untuk kecederaan khusus yang dialami oleh plaintif. Tiada isu pertindihan ganti rugi. Terdapat juga bukti perubatan daripada kedua-dua pihak mengenai pembaziran otot. Pemberian award oleh hakim mahkamah sesyen sebanyak RM5,000 adalah memadai (lihat perenggan 15, 17 & 19–20).
- (2) Juga tiada sebab untuk mengganggu award RM5,000 untuk luka melecet. Seterusnya, award yang lebih tinggi iaitu lebih RM10,000 dalam kes yang diputuskan melibatkan kecederaan tendon yang lebih serius. Tuntutan plaintif sebanyak RM30,000 untuk kecederaan sedemikian adalah tidak wajar. Award mahkamah sesyen sebanyak RM10,000 adalah adil. Hakim mahkamah sesyen memberi award RM5,000 untuk sindrom 'post-phlebitic' tanpa merujuk kepada mana-mana award yang diputuskan. Tiada yang turut dirujuk oleh kedua-dua pihak, walaupun plaintif mencadangkan award sebanyak RM15,000. Dengan ketiadaan sebarang alasan kukuh yang dikemukakan oleh pihak-pihak, mahkamah tidak mahu mengganggu award mahkamah sesyen (lihat perenggan 21, 23 & 26).
- (3) Penemuan pakar plaintif mengenai 'post traumatic sympathetic dystrophy' plaintif diperoleh daripada maklumat yang diberikan oleh plaintif semasa pemeriksaannya. Pakar defendan tidak menyatakan asas penemuannya bahawa plaintif tidak mempunyai simptom. Dalam keadaan itu, penerimaan mahkamah sesyen terhadap penemuan pakar plaintif adalah betul dan tidak ada sebab untuk mengganggu award RM7,000. Untuk tuntutan di bawah kesakitan dan penderitaan untuk pembedahan akan datang, tidak kira sama ada pembedahan kedua diperlukan, plaintif telah menjalani yang pertama dan perlu diberi pampasan. Oleh itu, award hakim mahkamah sesyen sebanyak RM5,000 telah dikekalkan (lihat perenggan 28–29 & 31).
- (4) Terdapat bukti dengan jelas kehilangan pendapatan kerana adalah tidak pasti sama ada plaintif akan dapat menyambung semula pekerjaannya. Terdapat bukti 'residual disability' yang akan menghalang pelaksanaan tugasnya seperti sebelum ini. Keterangan yang dikemukakan

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- A mencadangkan terdapat peluang yang munasabah dan kemungkinan plaintif kehilangan pekerjaannya dan dengan itu mengalami kehilangan pendapatan masa hadapan. Pengurangan satu pertiga daripada gaji dibuat untuk perbelanjaan sara hidup, berikutan amalan umum.
- B Berdasarkan formula ini, kehilangan gaji beliau ialah RM29,680 dan oleh itu diberikan. Memandangkan kehilangan pendapatan telah diperuntukkan dan diberikan secara berkanun, tiada award harus dibuat untuk kehilangan kapasiti pendapatan. Oleh itu, tuntutan plaintif untuk jumlah global RM50,000 untuk kehilangan kapasiti pendapatan tidak dibenarkan (lihat perenggan 36 & 38–39).
- C (5) Bagi tuntutan di bawah kos pembedahan masa hadapan, memandangkan plaintif telah menjalani pembedahan untuk menanggalkan paku bercantum, award RM8,000 seperti yang dicadangkan oleh defendan telah dikekalkan. Bagi jumlah RM30,000
- D yang dituntut oleh plaintif, tiada bukti kukuh untuk menyokong jumlah ini. Perbelanjaan perjalanan dijangka akan dikeluarkan untuk plaintif dan ahli keluarganya. Tuntutan plaintif untuk perbelanjaan perjalanan untuk rawatan pesakit luarnya adalah munasabah. Kecederaannya memerlukan rawatan susulan. Memandangkan tempoh tinggalnya di
- E hospital, ahli keluarganya juga akan melawatnya. Pemberian award hakim mahkamah sesyen sebanyak RM50 setiap perjalanan untuk perbelanjaan perjalanan plaintif dan ahli keluarganya berjumlah RM1,500 adalah adil. Untuk bayaran hospital/perubatan yang ditanggung, plaintif mesti memberikan bukti untuk menunjukkan pada
- F keseimbangan kebarangkalian, bahawa rawatan yang diperlukan untuk kecederaannya tidak tersedia di Hospital Banting. Tiada sebarang bukti dikemukakan oleh plaintif dalam hal ini. Hakikat bahawa syarikat insuransnya akan menanggung caj hospital sahaja tidak boleh mewajarkan dia mendakwa kos penuh yang ditanggung. Atas sebab ini,
- G hanya satu pertiga daripada yuran perubatan dibenarkan yang dikira sebanyak RM17,390. Akhir sekali, memandangkan bukti kehilangan pendapatan sebenar tidak dicabar, award itu adalah wajar. Bagaimanapun, plaintif seterusnya menuntut elaun dan komisen lain yang tidak diterima dalam tempoh ini. Ini adalah pembayaran yang
- H dibuat hanya jika plaintif sebenarnya bekerja. Komisen jangkaan beliau juga bersifat spekulatif. Selain itu, sebagai item ganti rugi khas, kehilangan pendapatan sebenar hanya akan diberikan untuk kerugian yang boleh dibuat pengiraan tepat dengan ketara (lihat perenggan 42–43, 48 & 50).]
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Cases referred to

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1, FC (refd)

Kasirin Kasmani v The Official Administrator & Anor [1991] MLJU 22; [1991] 2 CLJ Rep 800, HC (refd) A

Liong Thoo v Sawiyah & Ors [1982] 1 MLJ 286; [1981] CLJ 126 (refd)

Muhammad Yassein Zuliskandar (a child suing through his father and next friend, Zuliskandar Md Pechor) v Kerajaan Malaysia & Ors [2018] MLJU 2185, CA (folld) B

Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153, FC (refd)

United Plywood & Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237, FC (folld)

Yang Salbiah & Anor v Jamil bin Harun [1981] 1 MLJ 292, FC (refd)

Legislation referred to C

Civil Law Act 1956 s 28A

Samreet Singh Sagoo (Lovelace & Hastings) for the appellant.

Harjeet Singh Sidhu (PS Sohanpal & Sidhu) for the respondent. D

Loke Yee Ching JC:

INTRODUCTION

[1] For ease of reference, the parties shall be referred to as they were in the court below. Both the appeal and cross-appeal before me are by the defendant and the plaintiff respectively, against the decision of the sessions court in a running down action. The plaintiff's claim is for general and special damages attributed to the negligence of the defendant. E F

BACKGROUND FACTS

[2] On 21 December 2016, at about 6.30pm, the plaintiff was riding his motorcycle bearing registration number BLD 6785 along Jalan Klang-Banting-Port Dickson when he was collided into by the defendant who was driving his motor car of registration number WC 9979 D. The collision occurred at the rear portion of the plaintiff's vehicle. The plaintiff suffered injuries as a result thereof. G H

[3] He was brought to the Banting Hospital and treated at the emergency department. He was diagnosed to have open fracture distal third of right tibia and fibula, and was referred to the orthopaedic team for further management and admission. I

[4] However, he discharged himself the next day on his own accord to seek treatment at Sri Kota Specialist Medical Centre. He was admitted on 22 December 2016 and stayed on for treatment until he was discharged 3 January 2017.

A [5] The plaintiff then filed the instant suit for negligence in the sessions court. At the conclusion of the trial, on 29 November 2019, the sessions court found the defendant to be wholly liable for the accident and awarded general and special damages to the plaintiff.

B [6] The defendant filed an appeal in respect of both liability and quantum as assessed. The plaintiff filed a cross-appeal on the award of damages. However, before me the defendant now abandons the appeal in respect of liability. The appeal and cross-appeal before me are now confined to the issue of quantum only.

C ISSUES BEFORE THIS COURT

D [7] The parties are dissatisfied with the sessions court's award of damages under various heads of claim. The defendant contends that some of the awards made were manifestly excessive and in excess of any discernible trend of awards made in cases involving similar injuries. The plaintiff on the other hand contends that the awards in respect of some items were inadequate. In addition, the plaintiff contends that the sessions court had erred in refusing to make any award for future loss of earnings and earning capacity.

E [8] For ease of reference, the award of the sessions court, and the respective parties' contention as to the awards are presented in a table form as follows:

F	No	Injuries/Damages	Sessions Court (RM)	Plaintiff's claim (RM)	Defendant's contention (RM)
		General Damages			
G	1	Open fracture distal third of right tibia and fibula with 1cm shortening	40,000	65,000	23,000
	2	Scars on leg	8,000	18,000	8,000
	3	Wasting of right thigh and calf muscles	5,000	10,000	No award
H	4	Deep laceration wound on right leg with bone exposed	5,000	15,000	5,000
	5	Left shoulder tendon tear with long bicep tendon subluxation	10,000	30,000	10,000
I	6	Deep abrasion wound over right forearm	5,000	5,000	5,000
	7	Post-phlebitic syndrome	5,000	15,000	No award

8	Post traumatic sympathetic dystrophy	7,000	7,000	No award
9	Pain and suffering for future surgery	5,000	5,000	No award
10	Loss of future earnings/loss of earning capacity	No award	50,000	No award
	Special Damages			
1	Cost of future operation	8,000	30,000	8,000
2	Travelling expenses	1,500	1,500	No award
3	Hospitalisation	52,172	52,172	17,390
4	Cost of repair of motorcycle	840	840	840
5	Medical costs and orthopaedic treatment	177.40	177.40	177.40
6	Loss of actual earnings	27,967.74	59,296.74	No award

THE GOVERNING PRINCIPLES

[9] An award for general and special damages is compensatory in nature, and intended to provide some redress for what the plaintiff has suffered. It is not intended to be punitive and still less a reward. In *Yang Salbiah & Anor v Jamil bin Harun* [1981] 1 MLJ 292 the Federal Court held:

It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive.

(See also *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1.)

[10] In determining the appropriate quantum, the courts have been guided by precedents in comparable cases. The amounts awarded in past cases, which bear reasonable comparison with the case under review, would serve as useful guides. However previous awards would have to be adjusted upwards to take into consideration the fall in the value of money as a result of inflation (see *United Plywood & Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237; *Liong Thoo v Sawiyah & Ors* [1982] 1 MLJ 286; [1981] CLJ 126).

[11] I am mindful that the proceedings before me is an appeal against the award of sessions court. In this regard, guidance on the court's powers on appeal in respect of quantum can be found in the judgment of Gill FJ in *United Plywood & Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 at 238:

- A The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim, 'Good gracious, is that the sum which as been awarded — that sum must be altered', or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.
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[12] Similarly in *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153, the Federal Court held:

- C In such assessment there is generally ample room for individual choice to arrive at a fair and reasonable figure and the appellate court is always slow to reverse the trial judge's decision on such assessment unless there are strong grounds for interference. The Federal Court in *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61 following Lord Wright's judgment in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at pp 616–617 again stressed that it is not enough that there is
- D a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

- E [13] I shall now deal with the respective awards forming the subject matter of these appeals.

Open fracture distal third of right tibia and fibula with 1cm shortening

- F [14] The plaintiff suffered an open comminuted fracture of the right tibia and fibula with a 1cm shortening. The type of fracture sustained here is unlike a simple fracture but refers to bone broken into several fragments. Treatment for the fracture was by way of interlocking nail insertion over the right tibia. The medical reports tendered in evidence suggests some limitation of movement presently.

- G [15] Having referred to the *Bar Council's Revised Compendium of Personal Injury Awards* (2018) where RM36,000 and RM63,000 have been awarded for a similar injury, the sessions court decided on an award of RM40,000. Past awards are merely a guide and allowance can be made for the particular
- H circumstances of the instant case. The medical evidence shows the fracture to have united. I see no reason to disturb the award of the sessions judge by either reducing it or increasing it as I do not find it to be either manifestly excessive or grossly inadequate.

- I *Scars on leg*

[16] The medical evidence adduced by both parties established that there was scarring consequent upon the operations the plaintiff underwent to treat the fracture. The only dispute was the extent of the scarring. The sessions court

judge accepted the evidence adduced by the plaintiff's expert who said that there was a 9cm x 1cm hyperthropic scar on the right hip, a 2cm x 2cm hyperthropic scar on the left leg and a 16cm x 1cm hyperthropic scar on the right leg.

A

[17] Having considered the *Revised Compendium of Personal Injury Awards* (2018) where an award between RM2,500 and RM11,000 was given for scarring, the sessions court then awarded RM8,000. Based on the evidence on the extent of the scarring, I find RM8,000 to be reasonable.

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Wasting of right thigh and calf muscles

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[18] The defendant submits that muscle wasting is not an injury to warrant a separate head of damages. This disability would have been taken into account in the other injuries. To make a separate award for muscle wasting would amount to making a double award.

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[19] The award for the other injuries were only for the specific injuries suffered by the plaintiff. There is no issue of overlapping of damages. There is also medical evidence from both parties as to muscle wasting. More significantly, the defendant's own expert in his report said: 'He, however, continued to have significant muscle wasting in the right lower limb with the thigh circumference being 49cm on the right and 53cm on the left'.

E

[20] The sessions court judge's award of RM5,000 after considering awards in the *Personal Injury Reports* of between RM5,000 to RM10,000 whilst it is conservative, is not so inadequate. I therefore uphold his award.

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Deep laceration wound on right leg with bone exposed

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[21] When the plaintiff was taken to the Banting Hospital, he was treated for his wound, as the medical report stated that wound irrigation was done. Upon his admission at Sri Kota Specialist Medical Centre, his wound was noted to be a deep laceration wound 5cm x 8cm over the right leg with exposed bone. Based on the *Revised Compendium of Personal Injury Awards* (2018) the awards for laceration wounds range between RM2,500 to RM9,000 depending on whether they are single or multiple wounds. Having considered the awards previously given, the sessions court arrived at a figure of RM5,000. I see no reason to disturb the award.

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Left shoulder tendon tear with long bicep tendon subluxation

[22] The MRI which was done at the Sri Kota Specialist Medical Centre showed tears of the supraspinatus and infraspinatus tendon with subluxation of

- A the long head bicep tendon. This tendon injury was treated conservatively with physiotherapy. The plaintiff still complains of pain at this area of injury, with both experts recommending different treatment. The plaintiff's expert opined that surgical treatment would be necessary. The defendant's expert on the other hand is of the view that the residual injury is merely a tendon impingement with a painful arc and can be easily treated with medication and a steroid injection into the supraspinatus tendon.

- C [23] The *Revised Compendium of Personal Injury Awards* (2018) recommends an award between RM8,000 and RM10,000 for tendon injury. The higher awards of more than RM10,000 in decided cases involve a more serious tendon injury. The plaintiff's claim of RM30,000 for such an injury is not justified. The sessions court award of RM10,000 is fair and I affirm it.

D *Post-phlebotic syndrome*

[24] This syndrome describes a condition when the blood veins which supply blood to the body are damaged as a result of the injuries. This in turn cause swelling in the leg.

- E [25] Evidence on this condition being a consequence of the accident was disputed by the defendant's expert. Dr Yeoh Poh Hong was of the view that this condition is due to the plaintiff's lack of exercise. The plaintiff's expert Dr Suntharalingam, on the other hand, specifically stated that the right leg and ankle were swollen due to poor venous drainage. This resulted from the damage to the veins caused by the accident. The latter's evidence was accepted by the sessions court judge as his evidence was not challenged by the defendant.

- G [26] Thereupon the sessions court judge awarded RM5,000 without reference to any decided award. None was also referred to by both parties, although the plaintiff submitted an award of RM15,000. In the absence of any compelling reasons advanced by parties, I am disinclined to disturb the award of the sessions court.

H *Post traumatic sympathetic dystrophy*

[27] In respect of this injury, the defendant submitted that no award ought to be made as Dr Yeoh Poh Hong's expert report stated that the plaintiff did not have any signs or symptoms of post traumatic sympathetic dystrophy.

- I [28] This condition was described by the plaintiff's expert as a nervous response to injury resulting in pain and swelling exaggerated in cold weather. It causes swelling on the plaintiff's right leg which worsens when the weather is cold. His finding of this symptom was derived from information given by the

plaintiff during his examination. On the other hand, Dr Yeoh did not state the basis of his finding that the plaintiff did not have any symptoms of post traumatic sympathetic dystrophy. In the circumstances, I find that the sessions court's acceptance of the findings of the plaintiff's expert to be correct.

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[29] Based on awards in comparable cases, the sessions court then awarded RM7,000 for this injury. I see no reason to interfere.

B

Pain and suffering for future surgery

[30] The plaintiff underwent surgery to treat the comminuted fracture. The plaintiff's expert recommended two future operations; one to remove the interlocking nail and screws on the right tibia after the fractures have healed, and the other was to treat the impingement syndrome on the left shoulder.

C

[31] Since the filing of the suit, the plaintiff had undergone the first operation at Sri Kota Specialist Medical Centre on 9 October 2018. This operation was to remove the loosening of two distal screws over the right ankle when abscess was noted to be formed. As for the second operation, there is a divergence of views between both the experts on the necessity for the operation. Regardless of whether the second operation is necessary, the plaintiff had undergone the first and ought to be compensated. The authorities referred to allow for an award for pain and suffering for future surgery. I therefore uphold the award of the sessions court judge of RM5,000.

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Loss of future earnings

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[32] The plaintiff claims for loss of earnings or alternatively a global sum for loss of earning capacity. This claim was dismissed by the sessions court.

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[33] At the date of trial, the plaintiff was still on medical leave. He had not resumed employment. The plaintiff was employed by Linfox Transport (M) Sdn Bhd as a lorry driver. The human resource manager of the plaintiff's employer (SP4) testified that the plaintiff's duties require him to drive a lorry as well as lift heavy gas cylinders from and onto the lorry.

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[34] This evidence appeared to have been ignored by the learned sessions court judge in dismissing the claim for future earnings. He found that there was no evidence that the plaintiff was not able to be employed in the future. In his judgment he said this, 'Mahkamah dapati plaintif gagal menunjukkan beliau kehilangan pekerjaan beliau akibat dari kemalangan ini. Beliau juga gagal menunjukkan beliau tidak akan memperolehi apa-apa pekerjaan di masa hadapan akibat kecederaan beliau. Pada masa kini beliau masih bekerja dengan majikan asal walaupun tidak dibayar gaji disebabkan masih bercuti'.

I

A [35] At the date of trial, the plaintiff was still on leave. This was some 24 months after the accident. The sessions court refused to award any loss of future earnings notwithstanding his acceptance of the evidence that the plaintiff has not been paid any salary. His reason was that the plaintiff was still in employment. The fact of being in employment without any salary is as good as suffering a loss of future earnings.

B

C [36] There is clearly evidence of loss of earnings as it was uncertain if the plaintiff would be able to resume his employment. There is evidence of residual disability which would hamper the carrying out of his duties as before. The evidence adduced suggests there is a reasonable chance and likelihood of the plaintiff losing his employment and thereby suffering a loss of future earnings.

D [37] In order to assess loss of earnings, reference is to be had to s 28A of the Civil Law Act 1956, which allows an injured plaintiff to claim for loss of future earnings. The section also provides the method of calculation for such loss. The relevant provision is hereby produced:

28A Damages in respect of personal injury

E (1) ...

(2) In assessing damages under this section —

F (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

G (c) in awarding damages for loss of future earnings the Court shall take into account —

H (i) that in the case of a plaintiff who has attained the age of fifty-five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was receiving earnings by his own labour or other gainful activity before he was injured;

I (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

(d) in assessing damages for loss of future earnings the Court shall take into account that —

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty-one years and fifty-five years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

[38] The plaintiff was 48 years old at the time of the accident. His years of purchase would be 3.5 years (being 55 less 48 and dividing by two). I have taken the plaintiff's earnings as RM1,060 as that was his basic pay and telephone allowance at the time of the accident. This is based on the evidence of PW4, the senior manager of human resource department of Sykt Linfox Transport (M) Sdn Bhd. All other allowances are not considered as he would not be working. A reduction of one-third of this salary is made for living expenses, following general practice. Based on this formula, his loss of salary is RM29,680 and I so award.

[39] As loss of earnings has been statutorily provided for and awarded, no award should be made for loss of earning capacity. Therefore plaintiff's claim for a global sum of RM50,000 for loss of earning capacity is not allowed.

[40] Apart from general damages, the sessions court also awarded special damages which is also the subject of appeal and cross-appeal. They are now dealt with as follows.

Cost of future operation

[41] The sessions court awarded RM8,000 for this item of claim after accepting the recommendation of the plaintiff's expert that the plaintiff would need to undergo an operation to remove the interlocking nail and screws on the right tibia after the fractures have healed and to treat the impingement syndrome on the left shoulder.

[42] As the plaintiff had undergone the operation for removal of the interlocking nail, I would uphold the award of RM8,000 as proposed by the defendant. As for the amount of RM30,000 claimed by the plaintiff, I find no cogent evidence to support this amount bearing in mind the principles enunciated by the Federal Court in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1 which held:

- A [17] ... Having perused the authorities advanced by learned counsel for the appellant, we are of the view that the appellant's contention regarding the applicable standard of proof as regards future loss and damage was mistaken. We say so because while it is true that a plaintiff needs only to show that there is a reasonable chance of a loss or damage occurring in order for him to succeed in his or her claim for
- B future loss or damage, the standard of proof required in proving such a claim remains the same, that is on the balance of probabilities. In our understanding, the principles set out in *Schrump* and *Hawkins* merely outline the degree of certainty to be attached in relation to the assessment of the chance or likelihood that a loss or
- C damage might reasonably happen in the future in a claim for future loss and damage. In our view, such principles relate and should be understood in the context of the extent of the evidential value that the plaintiff needs to demonstrate in order to establish the claim for future loss or damage, which can be satisfied by the production of the related and sufficient evidence from the expert or by some other cogent evidence.
- D *Travelling expenses*
- E [43] Whilst special damages are subject to proof, travelling expenses can be expected to be incurred for the plaintiff and his family members. The plaintiff claim for travelling expenses for his outpatient treatment is reasonable. His injuries would have necessitated a follow-up treatment. In view of the duration of his hospital stay, his family members would have also visited him. The sessions court judge's award of RM50 per trip for the travelling expenses of the plaintiff and his family members totalling RM1,500 is fair. Notwithstanding
- F the absence of receipts, I would uphold the award (see *Kasirin Kasmani v The Official Administrator & Anor* [1991] MLJU 22; [1991] 2 CLJ Rep 800).
- Hospitalisation/medical fees incurred*
- G [44] The treatment the plaintiff received whilst he was hospitalised caused him to incur a total fee of RM52,172. This fee comprised of hospitalisation, cost of operation including subsequent operation and follow-up treatment.
- H [45] The plaintiff was first treated at the Banting Hospital. He chose to be discharged at his own risk the following day, and opted to be treated at the Sri Kota Specialist Medical Centre. His medical fees were paid by his insurers. The issue here is whether the plaintiff is entitled to claim for the full cost of medical fees incurred or is to be allowed only a partial claim.
- I [46] On this issue, the Court of Appeal case of *Muhammad Yassein Zuliskandar (a child suing through his father and next friend, Zuliskandar Md Pechor) v Kerajaan Malaysia & Ors* [2018] MLJU 2185 provides guidance as to the principles to be considered. It held:
- [11] This test of reasonableness was recently affirmed by the Federal Court in *Inas*

- Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016] 2 CLJ 885 ...
- [12] In other words, the test of reasonableness applies in two ways. First, the plaintiff must justify why he chooses treatment at a private hospital over a public hospital. Secondly, the plaintiff must show that the cost of treatment at a private hospital was reasonable. In determining whether it is, or was, reasonable or justifiable in resorting to treatment at a private hospital, there can be no fixed or inflexible rules simply because of the myriad of reasons or circumstances why treatment is sought or intended to be sought at a private hospital.
- [13] For instance, a plaintiff, immediately after an accident, may be brought by a good samaritan to the nearest private hospital in the interest of getting quick and early treatment. It may then be unjust to expect the plaintiff to justify why his claims at the private hospital ought to be allowed.
- [14] There may also be a case where a plaintiff is seriously injured and his only concern is to seek quick and effective treatment which he or she thinks is available at the private hospital only. At that moment, the plaintiff is hardly in a position to undertake a cost-benefit analysis of any potential claim against possible tortfeasors. In those circumstances, it may be reasonable to allow such claims.
- [15] In the end, there can be no fixed rule. It really depends on the peculiar circumstances of each case. With the *Inas Faiqah* decision, a claim instituted now for medical expenses cannot be denied purely on the ground that the particular treatment was available at a government hospital. A holistic consideration of the question of reasonableness is imperative before any decision can be made on whether such claims for private medical expenses can be allowed (see also *Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr Navin Kumar & Ors and other appeals* [2017] 4 MLJ 102; [2017] 3 CLJ 311).
- ...
- [19] After careful consideration, we do not think that sufficient reasons have been given to show that it was justified and reasonable for the plaintiff to be awarded the full sum of treatment expenses at the private hospital. There was evidence that the treatment required and the expertise needed is available at government hospitals.
- [47] On the evidence, the Court of Appeal upheld the trial judge's award of only one-third of the medical expenses incurred.
- [48] The plaintiff's discharge from Banting Hospital was not surprising in view of him being insured. However, he must advance sufficient reasons to show that it was justified and reasonable to be awarded the full sum of treatment at the private hospital. He must furnish evidence to show on a balance of probabilities, that the treatment needed for his injuries were not available at Banting Hospital. I do not find any evidence adduced by the plaintiff in this regard. The mere fact that his insurers will bear the hospital

- A charges alone cannot justify him claiming the full cost incurred. For this reason, I would allow only one-third of the medical fees which is calculated to be RM17,390.

Loss of actual earnings

- B [49] For this head of claim, the plaintiff was awarded a sum of RM27,967.74. The sessions court was satisfied that the plaintiff was still on medical leave up to the date of the trial. On the documentary evidence presented by the plaintiff's employer at P16, he was only paid salary for three months up to March 2017. However, the evidence of PW4, the senior manager of the plaintiff was that the plaintiff was not paid his nett basic salary of RM967.74 from March 2017. Hence the loss of his basic salary up to date of judgment was RM27,967.74.
- C
- D [50] As this evidence was not credibly challenged, I am of the view that the award was justified. However, the plaintiff further claimed for other allowances and commission not received during this period. These are payments made only if the plaintiff was in fact working. His expected commission is also speculative. Also, as an item of special damages, loss of actual earnings is to be
- E awarded only for loss capable of substantially exact calculation.

CONCLUSION

- F [51] In conclusion, the appeal and cross-appeal on quantum is partially allowed. The award of damages of the learned sessions judge is varied for the following items:
- (a) hospitalisation and medical costs at private hospital is reduced to one-third of RM52,173 to RM17,390; and
- G (b) loss of future earnings of RM29,680 is allowed, using the formula in s 28A of the Civil Law Act 1956; in which the years of purchase is 3.5 years and the multiplicand is two-third of RM1,060.

- H [52] All other awards of the sessions court are affirmed. Finally, I order that each party is to bear his own costs.

Appeal and cross-appeal partially allowed.

- I Reported by Ahmad Ismail Illman Mohd Razali